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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SMALL LANDOWNERS OF OAHU, and RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, and HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, and HAWAII EQUITY LEASEHOLDERS' COALITION, a Hawaii non-profit corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Although eager to relegate the Fifth Amendment's "public use" requirement to the status of a "poor relation" within the Bill of Rights, *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994), respondents City and County of Honolulu ("City") and Hawaii Equity Leaseholders' Coalition ("HALE Coalition") (collectively, "respondents") largely ignore the questions presented and instead argue points that are both undisputed and irrelevant to whether review should be granted. Once respondents' lengthy reiterations of the City Council's findings and of the decision in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984)—neither of which supports denial of the petition because they are precisely what is at issue in the petition—are set aside, what remains is a case that squarely presents the important and recurring constitutional issue of whether the deferential, rational-basis standard set forth in *Midkiff* should apply reflexively to *all* Fifth Amendment takings, regardless of the attendant circumstances, of whether closer scrutiny is warranted when traditional surrogate assurances of "public use" are absent. Respondents' submissions confirm that this case provides an ideal vehicle for addressing and resolving these questions.

1. Although respondents focus their attention on larger landowners, Ordinance No. 91-95 draws no distinctions between large and small property owners. Pet. App. 110a (" 'Development' means an area of land, irrespective of size"). Indeed, respondents nowhere dispute that the vast majority of the landowners affected will be those who own fee land beneath a single condominium project. Pet. App. 162a (89% of the 466 landowners own land under a single condominium project). Their plight is compelling:

> My grandparents had a dream to keep their estate together. Ever since my father was in high school, this land helped my grandparent support 17 children and many hanai children. Years of labor were put into working this land. Now, since the passing of

> my grandparent, my family has stayed united to keep the estate.

Pet. App. 179a; *id.* at 187a ("My family of three had to sacrifice many hardships, first to fill the coral land with dirt. Next came telephone, electricity, sidewalks and curbs [w]hich took us years to pay up. I'd like to give my land to my daughter"); *id.* at 179a-190a (collecting sample accounts). Thus, it is undisputed that Ordinance No. 91-95 will force many Native Hawaiians, whose families have owned the same land for generations, to sever that bond under threat of legal sanction to satisfy the private desires of a more numerous and politically influential group of condominium owners.

To be sure, the Just Compensation Clause ensures that landowners (after bearing the uncompensated burden and expense of a trial to determine the economic worth of their land) must be paid fair market value when their land is taken from them. U.S. Const. amend. V. But, as the Court has recently reconfirmed, "property is more than economic value . . . , it also consists of 'the group of rights which the so-called owner exercises in his dominion over the physical thing,' such 'as the right to possess, use and dispose of it.'" *Phillips* v. *Washington Legal Found.*, 118 S. Ct. 1925, 1933 (1998) (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)). As to those important, non-economic possessory interests, the Just Compensation Clause provides petitioners with little, if any, protection against illegitimate expropriation. Instead, the Public Use Clause is their only safeguard; it entitles petitioners to judicial confirmation that their property rights will not be invaded to serve some illegitimate "private" purpose. It is against this backdrop that petitioners' arguments regarding the proper contours of the "public use" requirement must be assessed.

2. Respondents' essential contention is that the lower courts' application of this Court's decision in *Midkiff* presents an insurmountable barrier to review. Given the primary thrust of their arguments, it is important to reiterate precisely what questions are presented.

Contrary to respondents' suggestions, petitioners do *not* seek relitigation of the lower courts' application of the deferential, rational-basis standard set forth in *Midkiff*. See Intervenor's Brief in Opposition to Petition for Writ of Certiorari 9-15 (arguing that "[t]he lower courts properly applied *Midkiff*") ("HALE Brief").[1] Rather, this case presents the entirely distinct issue of whether *Midkiff* "should be limited to the extent it suggests that deferential, rational-basis review is appropriate for all compensated takings of private property." Pet. i. As a result, respondents' extended arguments analyzing whether the court of appeals properly held that the City's boilerplate legislative findings were sufficient to satisfy *Midkiff* are irrelevant. See, *e.g.*, HALE Brief 10-15; City's Opposition to Petition for Writ of Certiorari 10-11 ("City Brief"). Rather, the crux of petitioners' claim is that application of *Midkiff*'s rational-basis review in all circumstances is inappropriate because such blanket deference would guarantee that virtually any claimed "public purpose," however flimsy, will be sufficient to insulate a taking of property from challenge under the Public Use Clause. Cf. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1026 n.12 (1992) ("the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations"); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (compliance with Takings Clause is "more than a pleading requirement" satisfied by "an exercise in cleverness and imagination").

In this respect, respondents' recitation of and reliance on the City's findings regarding "public purpose" are telling. For example, the HALE Coalition argues that Ordinance No. 91-95 satisfies *Midkiff* because the City Council announced that forcing landowners to sell their property to condominium owners would " 'promote the economy of Oahu and public interest, health, welfare, security and

[1] Although petitioners included intervenor HALE Coalition in their List of Parties, Pet. ii, the HALE Coalition inadvertently was omitted from the cover of the Petition for Writ of Certiorari.

happiness of such lessees and owners,' " HALE Brief 11 (quoting Pet. App. 107a), and would "advance the public interest and maintain a 'secure, strong and stable Oahu economy,' " *id.* at 12 (quoting Pet. App. 108a). Under *Midkiff*'s " 'extremely narrow' " review, 467 U.S. at 240 (quoting *Berman* v. *Parker,* 348 U.S. 26, 32 (1954)), such generalized findings, if accepted, are sufficient to support the conclusion that Ordinance No. 91-95 is "rationally related to a conceivable public purpose," *id.* at 241, and therefore not "proscribed by the Public Use Clause," *id.*

But it is precisely because application of the deferential standards set forth in *Midkiff invariably* will lead to this same conclusion—even where, as here, the alleged "public purposes" could not withstand even modest testing against the facts—that those standards warrant modification in certain limited circumstances. Cf. *Dolan* v. *City of Tigard,* 512 U.S. 374, 395-96 (1994) (rejecting City's reliance on "conclusory statement[s]" in support of "findings" and requiring City "to quantify its findings").[2] As a result, petitioners seek review *not* to have this Court reapply deferential scrutiny, but to establish that closer scrutiny is warranted to test adequately the "public use" justifications advanced by a local legislature, in support of an ordinance that results in no social surplus, employs no public funds and is intended for the express purpose of " 'tak[ing] *property* from A. and giv[ing] it to B.' " *Eastern Enters.* v. *Apfel,* 118 S. Ct. 2131, 2146 (1998) (plurality) (O'Connor, J.) (quoting *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)). Against this showing, respondents have virtually nothing to say, except

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[2] In other contexts, the Court has not hesitated to employ closer scrutiny to determine "which [actions] are constitutionally objectionable and which are not." *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 228 (1995) ("strict scrutiny" necessary to " 'differentiate between' permissible and impermissible" action); *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469, 493 (1989) ("searching judicial inquiry" necessary to " 'smoke out' " illegitimate government action) (plurality) (O'Connor, J.).

to insist that *Midkiff* itself does not provide for heightened scrutiny under any circumstances—which is the precise reason this case warrants review.

3. Notwithstanding the HALE Coalition's conclusory argument that Ordinance No. 91-95 is constitutional "under any test, . . . rational-basis or strict scrutiny," HALE Brief 15, the level of review is critical. For example, the HALE Coalition argues that "the City's use of its power of eminent domain to prevent a housing crisis resulting from a dispossession of the apartment-owners who could not afford the renegotiated rent was a valid 'public purpose.'" *Id.*[3] Closer analysis of this justification is fatal to Ordinance No. 91-95. Specifically, because the statute "does not provide for direct public money to purchase the lease fee," HALE Brief 18, the only condominium-owners who can take advantage of Ordinance No. 91-95 are those who can afford to buy the land in fee. See Pet. App. 119a-120a. Try as they might, see City Brief 11, respondents simply cannot explain how condominium owners who are unable to afford the rent could conceivably afford to pay the even higher costs associated with buying the land.

Similarly, with respect to the core claim of "public purpose" advanced by the City—*i.e.*, to "encourag[e] a free market in fee simple housing," City Brief 13—any quantum of heightened scrutiny is fatal to the constitutionality of Ordinance No. 91-95. In the court of appeals, Judge O'Scannlain explained that application of closer scrutiny revealed that Ordinance No. 91-95 was "nothing

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[3] Respondents repeatedly imply that renegotiation of long-term leases is unfair and would result in large increases in the rent being paid by owner occupants. *See, e.g.*, City Brief 11; HALE Brief 14. Yet, respondents do not dispute that the renegotiated rents reflect the fair market value of the land. Accordingly, respondents' claims that some of these rents will be "several hundred percent over and above their present rent," *id.*, confirms that the occupant-owners have for many years benefited from below-market rents and that landowners are being forced to sell just as they begin to earn a market-driven return on investment.

more than a naked transfer from one property owner to another." Pet. App. 37a (O'Scannlain, J., concurring and dissenting). Indeed, given the conspicuous absence of any finding of oligopoly, Judge O'Scannlain concluded that Ordinance No. 91-95 "will not change the value of the property" and "has nothing to do with changing the structure of Hawaii's real estate market." *Id.*

Undoubtedly aware that closer scrutiny would be fatal to Ordinance No. 91-95, the City falls back on claims that adoption of a "new 'heightened scrutiny' standard for evaluation of some [takings]" would be "unworkable," would embroil the courts in " 'empirical debates' " and would require the Court to "second gues[s]" the "wisdom of the ordinance." City Brief 14. None of these merits-related arguments militates against a grant of certiorari to consider whether heightened scrutiny is appropriate. In addition, none of them provides a persuasive reason for adhering to across-the-board deferential review.

First, the Court traditionally has varied the applicable constitutional standards, notwithstanding the difficult judgments associated with heightened scrutiny, where necessary to ensure faithful application and protection of important constitutional guarantees. See *Adarand*, 515 U.S. at 235 (racial classification subject to strict scrutiny); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (gender classification subject to intermediate scrutiny); *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (classification based on mental retardation subject to rational-basis review).[4] *Second*, to the extent that closer scrutiny under the Public Use Clause would require resolution of difficult issues not always susceptible to resolution through application of uniform bright-line

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[4] *See also Cohen* v. *California*, 403 U.S. 15, 26 (1971) (setting forth strict standards for analyzing regulation of political speech); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (setting forth lower standard for analyzing regulation of commercial speech); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942) (explaining absence of protection for " 'fighting' words" under the First Amendment).

standards, courts already are called upon to resolve such questions when assessing whether governmental action "goes too far" and therefore constitutes a regulatory taking of private property under the Fifth Amendment. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); see also *Eastern Enters.*, 118 S. Ct. at 2146 (whether government action constitutes a taking "does not lend itself to any set formula" and "is essentially ad hoc and fact intensive") (plurality) (O'Connor, J.); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (rejecting any "set formula" in favor of "ad hoc, factual inquiries" in assessing whether government action constitutes a taking of private property). Indeed, the requirement that courts sometimes "second-guess" the legislature's conclusions regarding the constitutionality of government action is inherent in judicial review. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("We cannot avoid the obligation to draw lines, often close and difficult lines" when protecting constitutional rights). In contrast, the legal certainty that respondents demand could be guaranteed only through non-enforcement of important and express constitutional protections. Cf. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995) (judicial enforcement of constitutional guarantees "always will engender 'legal uncertainty' "). *Finally*, adoption of heightened scrutiny in a limited number of circumstances would not embroil courts in "empirical debates over the wisdom of takings," *Midkiff*, 467 U.S. at 243, but instead would require that they take a closer look to assure that takings of private property unaccompanied by traditional guarantees of "public purpose" are justified by a legitimate legislative objective.

In short, application of closer scrutiny in this case would allow the Court to assess whether the "real purpose" underlying Ordinance No. 91-95 is, as the HALE Coalition candidly (if inadvertently) concedes, nothing but an illegitimate attempt to "facilitat[e] the transfer of the fee

simple interest from the ground lessors who refuse to sell to the owner-occupants." HALE Brief 11.

4. Similarly misguided is respondents' argument that the absence of conflict among the lower courts is an insurmountable obstacle to review. City Brief 11-15. In fact, the basis upon which petitioners seek review—*i.e.*, the overbroad application of *Midkiff* deference to all compensated takings—is the very reason that no conflict among the courts of appeals or state supreme courts could develop. Put another way, the broad and deferential standards set forth in *Midkiff* have precluded any conflict by effectively insulating *all* takings of private property from challenge under the Public Use Clause. Quite apart from the nature of petitioners' challenge, the absence of conflict has never been held to preclude reexamination of a prior decision on an important issue of constitutional law, especially where that decision is in "tension" with more recent precedent. See Pet. App. 33a (O'Scannlain, J., concurring and dissenting); *Agostini* v. *Felton*, 117 S. Ct. 1997, 2016 (1997) (confirming willingness to revisit decisions based on "subsequent development of our constitutional law" because the Court's "interpretation can be altered only by constitutional amendment or by overruling our prior decisions").

5. Unable to set forth a persuasive reason why review should be denied, respondents instead argue, on the merits, that the objective factors identified by petitioners that warrant heightened scrutiny should be rejected. See City Brief 15-17; HALE Brief 15-16. In particular, the City contends that the Court should not consider whether *Midkiff* applies in all circumstances because the distinctions between this case and *Midkiff* do not support adoption of a separate constitutional standard. City Brief 15. To support these claims, respondents manipulate the record to suggest that the underlying legal conclusions reached in *Midkiff* also should apply here. *Id.* These efforts actually underscore the important differences between this case and *Midkiff*.

First, as the court of appeals confirmed, unlike the statute in *Midkiff*, Ordinance No. 91-95 was "not grounded on the desire of breaking up a land oligopoly," Pet. App. 13a, but to "facilitat[e] the transfer of the fee simple interest from the ground lessors who refuse to sell to the owner-occupants," HALE Brief 11. As a result, the *Midkiff* Court's conclusion that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," 467 U.S. at 242, simply has no application in this case. Thus, the City is wrong when it contends that the transfer of property here "was exactly the situation in the *Midkiff* case." City Brief 16.[5]

Second, given that the statute in *Midkiff* was unquestionably designed to combat the artificially inflated land prices associated with oligopoly, the absence of any infusion of public funds was consistent with the State's expressed public purpose of facilitating the transfer of property to parties willing and able to pay fair market value for the land. In the absence of oligopoly, however, the failure of the local legislature to contribute public funds not only deprives Ordinance No. 91-95 of a presumption that it was designed to advance a public purpose, see *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), but also refutes the City's claim that it was promulgated to assist owner-occupants who could not afford to pay the market-based rents to purchase the land beneath their condominium units—land whose fair market value for just compensation purposes is based in large part on those rents. Thus, the absence of public funds in this

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[5] Respondents pepper their briefs with comparisons using mismatched data to argue that the concentration of ownership of land here is little different from that in *Midkiff*. *See, e.g.*, City Brief 3; HALE Brief 14-15. The fact remains that in *Midkiff*, "22 landowners owned 72.5% of the fee simple titles," 467 U.S. at 232, whereas here, 466 different landowners owned the land underneath 754 condominium complexes, and the largest 60 landowners accounted for just over 50% of the total condominium units. Pet. App. 162a, 192a. Thus, the court of appeals was correct to conclude that Ordinance No. 91-95 is not necessary to break up any land oligopoly. Pet. App. 13a.

case confirms that the "real purpose" of Ordinance No. 91-95 was simply to coerce one private party to transfer its land to a more numerous and politically well-positioned private party. Pet. App. 37a.

Finally, unlike the state-wide program at issue in *Midkiff*, Ordinance No. 91-95 was passed at the local level, by a unicameral body in which every member acknowledged a personal stake in the legislation. Pet. App. 173a. That fact is critical given that "[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." *J.A. Croson*, 488 U.S. at 523 (Scalia, J., concurring); see also The Federalist No. 10 (James Madison). Indeed, the Court's recent Fifth Amendment jurisprudence has demanded closer scrutiny of localized government action relating to private property rights under the Fifth Amendment. See *Dolan*, 512 U.S. at 391 (requiring City to demonstrate "rough proportionality").

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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